Kamalahassan a/l Latchimanan v Pendakwa Raya

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–59 OF 2003
SURIYADI, HASAN LAH AND SULAIMAN DAUD JJCA
13 MARCH 2008

Criminal Law — Dangerous drugs — Trafficking — Role of informer — Whether informer metamorphosed into agent provocateur — Whether failure to call informer as witness attracts presumption of adverse inference under s 114(g) of the Evidence Act 1950 against prosecution

Criminal Law — Dangerous drugs — Trafficking — Whether prosecution established prima facie case as per charge — Whether any serious errors in prosecution's case which warranted appellate interference — Dangerous Drugs Act 1952 ss 6, 39A(2) & 39B(1)(a)

Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — Trafficking — Agent provocateur — Discrepancies in evidence of — Whether prosecution established prima facie case as per charge — Dangerous Drugs Act 1952 ss 6, 39A(2) & 39B(1)(a)

This is an entrapment case set up by the police with the aid of an informer to establish trafficking. The informer arranged for a meeting between D/Sjn Busra b Abd Kadir ('the agent provocateur') and the alleged trafficker (the appellant). The agent provocateur was to be introduced to the appellant as a potential buyer with the evidence establishing that the appellant was involved in a negotiation for the sale of drugs. At the pre-arranged meeting, the informer introduced the agent provocateur to the appellant. After this meeting, where there was an alleged discussion between the parties about the price of the drugs, the appellant led the agent provocateur to the end of a lane and handed to him a blue plastic packet, which he had picked up from the road beside a drain. When the agent provocateur opened the packet he found in it compressed dried leaves believed to be cannabis. A subsequent analysis of the contents of the packet by a chemist confirmed that the seized blue packet contained a total of 316g of cannabis. The agent provocateur thereafter pretended take out a sum of money totalling RM2,000 to pay the appellant and at the same time gave the pre-arranged signal to the police party lying in ambush, which led to the arrest of the appellant. The main thrust of

A the prosecution's case was the evidence of the agent provocateur, which went to establish that the appellant was involved in a negotiation for the sale of drugs. At the trial, the appellant's defence was that he was never in possession of the drug and had no knowledge of it. The appellant's version of the events was that he had been travelling in a car with two of his friends, when one of B them had taken out a blue plastic packet from the car and placed it near a rubbish dump that was at the end of the lane. His friend had then allegedly asked him to enter a restaurant and meet the informer. When he met the informer in the restaurant, the informer had introduced him to the agent C provocateur and the informer had asked the appellant to show the agent provocateur where the blue packet was placed. The court rejected this part of the appellant's evidence because the court was of the view that it was highly improbable that the appellant would act so willing, obliging and unquestioning. The appellant was thereafter convicted under s 39B(1)(a) of D the Dangerous Drugs Act 1952 ('the Act'), which carries the mandatory sentence of death by hanging. This was the appellant's appeal against that sentence. The main issue for consideration in this appeal was whether there were any serious errors in the prosecution's case, which warranted the interference of the appellate court.

E

Held, setting aside the conviction and sentence:

F (1) In the instant, it would appear that factually the informer was present in every significant event. Therefore, having considered the totality of the evidence pertaining to the informer it was highly likely that he must have crossed the line where the world of an agent provocateur begins. However, even if there was uncertainty as to whether he was an G informer or not the benefit of the doubt must be given to the appellant. In any case the prosecution evidence was not so overwhelming as to suppress the invocation of s 114(g) of the Evidence Act 1950 (see para 19).

H (2) There were also certain discrepancies in the agent provocateur's evidence. The irresistible conclusion to be drawn from the discrepancies was that there was a gap in the chain of the prosecution's evidence to establish that there was a negotiation for the sale of drugs involving the appellant. As the prosecution had relied on direct evidence to establish I the alleged negotiation and since its very existence had now been rejected, the prosecution could not be said to have established a prima facie case as per the charge (see para 21).

(3) However, as there was abundant of evidence of the appellant being in possession of cannabis weighing 316g, with the other relevant

ingredients of the charge having been established, the charge was reduced to that of possession under s 6 of the Act punishable under s 39A(2) of the Act (see para 22).

[Bahasa Malaysia summary

Ini adalah kes pemerangkapan yang dirancang oleh pihak polis dengan bantuan pemberi maklumat untuk membuktikan pengedaran. Pemberi maklumat tersebut mengatur satu pertemuan di antara D/Sjan Busra b Abd Kadir (ejen provokasi) dan pengedar yang dikatakan (perayu). Ejen provokasi tersebut telah diperkenalkan kepada perayu sebagai pembeli berpotensi dengan keterangan yang membuktikan bahawa perayu terlibat dalam tawar-menawar untuk penjualan dadah. Semasa pertemuan yang telah diatur sebelumnya, pemberi maklumat memperkenalkan ejen provokasi kepada perayu. Selepas pertemuan ini, di mana terdapat perbincangan di antara pihak-pihak berkenaan dengan harga dadah tersebut perayu membawa ejen provokasi ke hujung lorong dan memberikannya satu bungkus plastik biru, yang diambilnya dari tepi jalan bersebelahan dengan longkang. Apabila ejen provokasi membuka bungkusan tersebut, dia menjumpai di dalamnya daun-daun kering yang dimampatkan yang dipercayai kanabis. Analisa kandungan bungkusan tersebut kemudiannya oleh ahli kimia mengesahkan bahawa bungkusan biru yang dirampas itu mengandungi sejumlah 316g kanabis. Ejen provokasi kemudiannya berpura-pura mengeluarkan wang berjumlah RM2,000 untuk membayar perayu dan pada masa yang sama memberikan isyarat yang telah diatur kepada pasukan polis yang menunggu untuk menyerang, yang membawa kepada penangkapan perayu. Sandaran utama kes pihak pendakwaan adalah atas keterangan ejen provokasi tersebut, yang membuktikan bahawa perayu telibat di dalam tawar-menawar penjualan dadah tersebut. Semasa perbicaraan, pembelaan perayu adalah bahawa dia tidak langsung memiliki dadah tersebut dan tidak mempunyai pengetahuan mengenainya dan memberikan versinya tentang kejadian tersebut. Versi perayu mengenai kejadian tersebut adalah bahawa dia sedang dalam perjalanan menaiki kereta dengan dua orang kawannya, apabila salah seorang daripada mereka mengeluarkan bungkusan plastik biru dari dalam kereta dan meletakkannya berhampiran dengan tempat membuang sampah yang terdapat di hujung lorong tersebut. Kawannya kemudian, didakwa telah menyuruhnya masuk ke sebuah restoran dan berjumpa dengan pemberi maklumat. Apabila dia bertemu dengan pemberi maklumat di restoran, pemberi maklumat tersebut memperkenalkannya kepada ejen provokasi dan pemberi maklumat telah menyuruh perayu untuk menunjukkan kepada ejen provokasi di mana bungkusan biru tersebut diletakkan. Mahkamah menolak bahagian ini dari keterangan perayu kerana mahkamah berpendapat bahawa amat mustahil perayu akan bertindak dengan begitu rela, akur tanpa menyoal. Perayu kemudian disabitkan di bawah s 39B(1)(a) Akta Dadah

A Berbahaya 1952 ('Akta tersebut'), yang membawa hukuman mandatori gantung sampai mati. Ini adalah rayuan perayu terhadap hukuman. Isu utama untuk dipertimbangkan di dalam rayuan ini adalah sama ada terdapat apa-apa kesilapan yang serius di dalam kes pihak pendakwaan, yang mewajarkan campur tangan mahkamah rayuan.

B

Diputuskan, mengenepikan sabitan dan hukuman:

C (1) Di dalam kes ini ia jelas bahawa secara fakta pemberi maklumat hadir dalam setiap peristiwa yang penting. Oleh itu, selepas mempertimbangkan keseluruhan keterangan berkaitan dengan pemberi maklumat, besar kemungkinan bahawa dia telah melanggar batasan di mana tugas ejen provokasi bermula. Walau bagaimanapun, jika terdapat
D ketidapastian sama ada dia adalah seorang pemberi maklumat atau tidak, faedah keraguan tersebut tersebut mesti diberikan kepada perayu. Namun, keterangan pihak pendakwaan tidak begitu jelas sehingga boleh menyekat penggunaan s 114(g) Akta Keterangan 1950 (lihat perenggan 19).

E (2) Juga terdapat beberapa percanggahan di dalam keterangan ejen provokasi. Kesimpulan yang tidak boleh ditentang yang boleh dibuat daripada percanggahan-percanggahan tersebut adalah bahawa terdapat jurang di dalam rangkaian keterangan pihak pendakwaan untuk
F membuktikan bahawa terdapat tawar-menawar untuk penjualan dadah yang melibatkan perayu. Oleh kerana pihak pendakwaan menyandar pada keterangan langsung untuk membuktikan tawar-menawar yang didakwa dan oleh kerana kewujudannya kini telah ditolak, pihak
G pendakwaan tidak boleh dikatakan telah membuktikan kes prima facie seperti yang dituduh (lihat perenggan 21).

(3) Walau bagaimanapun, oleh kerana terdapat keterangan yang jelas bahawa perayu mempunyai milikan kanabis seberat 316g,
H bersama-sama dengan unsur-unsur relevan yang lain pertuduhan tersebut dibuktikan, tuduhan dikurangkan kepada milikan di bawah s 6 Akta tersebut yang boleh dihukum di bawah s 39A(2) Akta tersebut (lihat perenggan 22).]

I **Notes**

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 590–593.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Adel Mohammad el Dabbah v AG Palestine [1944] AC 156 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Namasiyian & Ors v PP [1987] 2 MLJ 336 (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (refd)

Legislation referred to

Criminal Procedure Code s 182A
Dangerous Drugs Act 1952 ss 6, 6(1), 37, 37(j), 39A(2), 39B(1)(a), 40, 40A, 40(1)
Evidence Act 1950 s 114(g)

Kumaraendran (Kumar & Co) for the appellant.
Eddie Yeo Soon Chye (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] On 11 March 2008, we heard this appeal and had set aside the conviction of the appellant under s 39B(1)(a) of the Dangerous Drugs Act 1952, which carries the mandatory sentence of death by hanging. We had instead substituted that conviction with that of s 6(1) of the Dangerous Drugs Act 1952, for being in possession of 316g of cannabis, and sentenced him under s 39A(2) of the same Act.

[2] As regards the facts, acting on information regarding the activity of an Indian Muslim trafficking cannabis at Jalan Kuala Kangsar, Ipoh, D/Sjn Busra b Abd Kadir ('SP5') had arranged a meeting with an informer, to have himself introduced to the alleged trafficker ie the appellant. SP5 was to be the potential buyer and thereafter to arrest the appellant. The informer made an appointment with the appellant whereby he agreed to meet SP5 on 1 February 2000 between 2pm to 2.30pm at Restoran Rajamah, Jalan Kuala Kangsar, Ipoh. At about 2.20pm on 1 February 2000, SP5 went to Restoran Rajamah with the informer. Upon reaching the vicinity the informer went alone into the said restaurant while SP5 waited outside. At about 3.10pm the informer called SP5 on his hand phone informing him that the appellant had arrived and was with him in the restaurant. SP5 went into the restaurant where he was introduced to the appellant. The latter introduced himself as Kamal. He informed SP5 that he only had about 1/2kg of drugs (*barang*). Some discussion was held between them about the price of the drugs. When they reached an agreement on the price, the appellant together with SP5 went to a lane at the back of the restaurant, and upon reaching the end of the lane the appellant picked up a blue plastic packet on the road beside a drain and handed it over to SP5. SP5 opened the packet, and found in it compressed dried leaves believed to be cannabis, wrapped in a Malay newspaper.

[3] SP5 handed back the packet to the appellant and pretended to take out a sum of money totalling RM2,000 (normally referred to as *flash money*) from his pocket to pay him. SP5 then immediately gave the prearranged signal to the police party lying in ambush followed by his arrest of the appellant. The seized plastic packet was taken by C/Insp Elias b Abu Bakar ('SP4'). At the narcotics office, SP4 marked the exhibits, left his signature and subsequently handed it over to the investigating officer ('SP7'), together with the appellant at about 7pm. At about 11.05am on 2 February 2000, SP7 handed over the exhibits to the chemistry department in Ipoh for analysis. The analysis was done by SP2 who then confirmed that the seized blue packet contained a total of 316g of cannabis.

FINDINGS OF THE HIGH COURT JUDGE

[4] The High Court had concluded that the evidence of SP5 was the main thrust of the prosecution's case, with the evidence establishing that the appellant was involved in a negotiation for the sale of drugs. The informer only played the role of setting up a meeting between SP5 and the appellant. The evidence of SP5 was corroborated by the evidence of SP4 who testified that he was informed by SP5 about the information received. It was on his instruction that P5 had acted as an agent provocateur to meet the appellant. It was not disputed that SP5 was an agent provocateur and his evidence was admissible under s 40A of the Dangerous Drugs Act 1952. The evidence of SP5 was never really challenged by the defence; instead it was the existence of the informer and his identity that attracted much of the defence attention. From the entirety of the evidence, the court had held that the role played by the informer had not been exceeded, as to justify the invocation of s 114(g) of the Evidence Act on the failure of the prosecution to call him as a witness. His role was merely to introduce the appellant to SP5. At no time was he proved to be playing any important role that could turn him into an agent provocateur or a participes criminis.

[5] The court was satisfied too with the evidence of SP6, the government chemist, which showed that the analysis carried out on the exhibit was by way of four tests involving physical examination as well as microscopic examination on the whole of the compressed plant material. A total of 32 random samples were taken in order to carry out further tests namely DLT and TLC. The total weight of the 32 random samples taken for the two chemical tests was 114g (which amounted to 36.08% of the total weight). The requirement of s 37(j) of the Dangerous Drugs Act had been fulfilled. The gross weight of the drugs seized was 360g whilst the net weight was only 316g. The reason for the discrepancy was simply brought about by the packaging material namely the plastic packet and the newspaper wrapping which was included in the investigating officer's weighing. From the evidence

of SP4, SP7 (the investigating officer), SP2 (store keeper) and SP3, there was no break in the chain of evidence as regards the exhibits. From the above the court was satisfied that the prosecution had established a prima facie case and thereupon had called the defence.

[6] The appellant's defence was as follows. On 1 February 2000 at about 2pm while he was alone in his adopted mother's house, his friends Basirudin and Yusof came to visit him. They came in a car (Proton Iswara) registered as BCU 1362. At about 3pm they left the house for Chemor to eat and Basirudin drove the car with Yusof seated in front. When passing through Jalan Kuala Kangsar near Restoran Rajamah, Basirudin suddenly turned left, passed in front of Restoran Rajamah, and stopped at the end of a lane. Basirudin then took out a blue plastic packet from the car dashboard and placed it at a rubbish dump nearby. Basirudin then got back into the car and made a u turn to go out. Halfway through he stopped the car, and told the appellant to go to Restoran Rajamah to meet his friend named Man, and to tell Man that he had placed the blue plastic packet at the rubbish dump. The appellant went to the restaurant, met Man, and was introduced there to a Malay man named Bob. After telling Man that Basirudin had placed the blue plastic packet at the rubbish dump and was about to leave, Man asked the appellant to show where the packet was placed to Bob. This part of the evidence of the appellant was rejected by the court. According to the court it was highly improbable for the appellant not to bother to even ask why Basirudin acted the way he did, and for him to be so willing and obliging to do what was instructed by Basirudin. It was made more improbable when he acceded to Man's request to show Bob (SP5) the place where the blue plastic packet was allegedly placed by Basirudin. Pertaining to the defence, that the appellant was never in possession of the drug, and had no knowledge about it was rejected. The court had concluded that the prosecution was not relying on any presumption under s 37 of the Dangerous Drugs Act 1952, and there was evidence that the appellant was caught transacting the sale of cannabis.

[7] Having perused the learned High Court judge's judgment, we could not disagree with him that the prosecution had established the type of drugs involved ie cannabis, and its weight as particularised in the charge. We were satisfied too that the chain of evidence as regards the drugs had not been compromised. Even the issue of burden of proof required by the appellant to rebut the prosecution's case, which initially in the memorandum of appeal had been one of the grounds of appeal, and not canvassed eventually, had been correctly dealt with by the learned judge. It was correct that the burden to rebut the prosecution's case was on a balance of probability as statutorily required under s 182A of the Criminal Procedure Code.

[8] So, why did we set aside the conviction and substitute it with the amended charge? Despite the well researched judgment we detected certain serious errors at the prosecution's stage which warranted our interference. There was the issue of the informer ie whether he had metamorphosed to that of an agent provocateur and the repercussion of not calling him as a witness or offered to the appellant, whether negotiation had conclusively been proved between the appellant and SP5 in light of PW8's evidence, and whether only mere possession had been established.

[9] It was a fact that an informer was instrumental here in the events that led to the eventual arrest of the appellant. The law is quite clear that under s 40 of the Dangerous Drugs Act an informer is protected statutorily from discovery. This section reads:

> (1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.
>
> (2) If any books, documents or papers which are in evidence or contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.
>
> (3) If on trial for any offence under this Act the Court, after full inquiry into the case, is of opinion that the informer willfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

[10] This provision has been invoked and discussed in quite a few cases though the emphasis has been more on the matter of the definition of the word 'informer'. This was inevitable as that term was not defined in the Act; though in ordinary parlance an informer is a person who provides information (*Law of Dangerous Drugs (Cases and Commentaries)* by Daljit Sen Adel). In relation to criminal cases, an informer may be defined as an undisclosed person who confidentially discloses material information of a law violation, thereby supplying a lead to officers for their investigation of a crime (*Black's Law Dictionary*). The above s 40 succinctly promulgates that no

witness shall be permitted to disclose the name and address of any informer or state any matter which discloses his identity. In other words to fall under the definition of 'informer' his identity must remain undisclosed. But courts have given it an extended meaning, and have accorded all the privilege of s 40 for informers, even though their identities have been disclosed (more of this later).

[11] Currently, in a police operation where an informer goes beyond mere supplying of information or the mere introduction of the police to the appellant, but takes the extra mile of encouraging the target to induce the commission of a crime, courts are of the view that he has metamorphosed into an agent provocateur. If that happens his evidence becomes admissible under s 40A of the same Act but naturally loses his protection under the abovementioned s 40.

[12] Normally an agent provocateur is presumed to be unworthy of credit and testimony. Section 40A(1) supplies the exception in that no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or had abetted the commission of an offence by any person under the Dangerous Drugs Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

[13] Once an informer falls under the category of an agent provocateur, any failure to call him as a witness may attract the presumption of adverse inference under s 114(g) of the Evidence Act 1950. In such a situation since it is the right of the prosecution to call or not to call any witness, and to avoid any potential sticky position, rather than calling him to testify, it is in order for the prosecution to offer that witness to the accused person (*Adel Mohammad el Dabbah v AG Palestine* [1944] AC 156). By doing this the prosecution avoids being accused of suppressing or withholding any evidence in the form of a witness (*Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494).

[14] Where then is the line to be drawn as to when an informer becomes an agent provocateur? In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, Mohammad Azmi SCJ was generous when he opined that a police informer was not an agent provocateur merely because he had accompanied a police agent and introduced him to a drug trafficker. Somehow the statutory ingredient of the need to be undiscovered to qualify as an informer had been missed. The Supreme Court had further opined:

> *In our opinion whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case*. In the instant case the protection under s 40(1) clearly applies since the evidence showed that all the informer did was to accompany DPC Lian on the 14th and introduce him to the

appellant. Accordingly there is no merit in the argument that the learned judge ought to have invoked the adverse presumption under s 114(g).

(Emphasis added.)

[15] In *Namasiyian & Ors v Public Prosecutor* [1987] 2MLJ 336, it was held that a person who not only introduced the accused but was present on more than one occasion including at the time of *the accused's arrest* in the subsequent delivery of the drug, was a particepes criminis and not an informer whose failure to appear in court may well attract the provisions of s 114(g) of the Evidence Act 1950. In brief, apart from being an introducer and hence identifiable, and was present on more than one occasion in the presence of the trafficker including when he was arrested, he had become an agent provocateur. In *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 the apex court held a slightly modified view. The antecedents of the case showed that the role played by an informer, one Cholar had come under heavy scrutiny of the High Court judge, during the trial. At the conclusion of the case the learned trial judge had held that the role played by Cholar was more than that of an informer and had disentitled him to the statutory protection under s 40(1) of the Act. Based on the evidence that Cholar introduced PW9 to the second respondent on 18 July 1991, accompanied and witnessed PW9 purchasing one kati of ganja from the first accused on 22 July 1991 in the house No 129; and again accompanied and was present throughout the discussion between the first respondent and PW9 regarding the purchase of the cannabis (subject matter of this offence) on 31 July 1991 in the said house, the learned trial judge said 'the informer participated in the trap set up by Badaruddin which eventually led to the arrest of the three accused persons and the seizure of the drugs'. Thus the learned trial judge said that Cholar was not just an informer but an active agent provocateur, and that failure by the prosecution to call or offer Cholar to the defence would give rise to adverse inference under s 114(g) of the Evidence Act 1950.

[16] The Federal Court on the other hand, despite the active involvement of the exposed informer disagreed with the High Court and had held that based on the particular facts and circumstances of the case Cholar was not an agent provocateur. Interestingly enough the Federal Court after arriving at that finding remarked that, even if Cholar were an agent provocateur and hence should have been called, there was more than sufficient credible evidence of the respondents' involvement in drugs trafficking to convict him. It would appear that the Federal Court justified its disagreement with the High Court's stance due to the availability of overwhelming evidence of the accused person's culpability. It could be read that since the conviction of the

accused person would still be assured, despite the invocation of s 114(g) of the Evidence Act 1950, the informer's status as an agent provocateur did not really matter.

[17] If the degree of participation is the dividing line, surely the following pieces of evidence will highlight the active role played by the informer in this case:

(i) even though the informer was not in the briefing he was present in the police station while the briefing was going on;

(ii) he was around for some time and must have heard the alleged negotiation between SP5 and the appellant; and

(iii) he was nearby when the appellant was arrested (see *Namasiyam* on this issue).

[18] Even though SP5 had testified that the informer had kept quiet during the negotiation, he admitted in court that the informer was an important witness, and had an interest in the case. If the informer was a mere informer why was there a necessity to be present at the police station? Why did he not leave immediately after the introductions were over? Why must he be present when the arrest took place? Factually he was present in every significant event. If SP5 had telephoned the appellant before the meeting at Rajamah why was there the need to have the informer in the vicinity of the ambush? With the informer's cover and identity blown, there was no justification in not calling him as a witness, or for that matter not offering him to the appellant.

[19] Having considered the totality of the evidence pertaining to the informer it was highly unlikely that this person was a mere informer. And if he was not a mere informer he thus must have crossed the line where the world of an agent provocateur begins. Even if there were uncertainty as to whether he was still a mere informer or not the benefit of the doubt must be given to the appellant. We had to bear in mind too that the evidence adduced in this case was not as overwhelming as in the above case of *Pendakwa Raya v Mansor bin Mohd Rashid & Anor*, which would suppress the effect of the invocation of s 114(g) of the Evidence Act 1950.

[20] The other relevant question that disturbed our minds when deliberating the appeal was the issue of the negotiation. According to SP5, the negotiation with the appellant took up 15 minutes, yet SP8 who was a prosecution's witness had testified that SP5 and the appellant only conferred for 3–4 minutes. For someone who had never met the appellant, and yet succeeded in establishing all the terms of the transaction, surely 3–4 minutes was too quick. Yet 3–4 minutes would tally with the evidence of the

A appellant's story that he was there only to inform the informer of the plastic blue bag. In a gist the issue of negotiation was subverted by the prosecution's very own evidence of PW8.

B **[21]** Additional to this doubt was the allegation by SP5 that he flashed RM2,000 to establish the authenticity of his desire to buy drugs. Yet SP7, the investigating officer had no knowledge of this money. No explanation was given by SP4 and SP5 why the investigating officer was not informed of this highly important piece of evidence, for trap cases of this nature. In any entrapment case set up by the Anti-Corruption Agency, not too dissimilar to C cases of this nature, the availability of the marked notes in the safe keeping of the investigating officer would certainly not be taken lightly. The irresistible conclusion that we could arrive at, out of this gap in the chain of evidence, was that there probably never was a negotiation. The additional evidence of SP8 rebutting SP5's evidence in relation to the time factor D required for the negotiation made short shrift of that alleged incident. Since the prosecution never invoked the presumption of trafficking in its case, but had confidently depended on direct evidence to establish trafficking ie the alleged negotiation, but its very existence now having been rejected, there thus was total failure in establishing such an essential ingredient. That being E so the prosecution could not be said to have established a prima facie case as per the charge.

[22] With so many unsatisfactory features existing in the prosecution's case we were of the view that it was unsafe to uphold the eventual conviction and F sentence by the High Court judge hence its setting aside. Despite that setting aside order, we were satisfied that there was abundant evidence of the appellant being in possession of cannabis weighing 316g. With the other relevant ingredients of the charge having been established, we had no hesitation in reducing the charge to that of possession under s 6 of the G Dangerous Drugs Act 1952, punishable under s 39A(2) of the same Act. After hearing the mitigation of learned counsel for the appellant and views of the learned deputy public prosecutor, we had sentenced the appellant to 14 years imprisonment, with effect from his date of arrest, and a mandatory whipping of 10 strokes of the rotan.

H

Conviction and sentence set aside.

Reported by K Nesan

I